Supreme Court U.S.
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No. 01-1119

IN THE

Supreme Court of the United States

OPERATION RESCUE,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ABBREVIATIONS KEY

Opp.	Brief in Opposition
OR	Petitioner Operation Rescue
OR Pet.	Petition for Writ of Certiorari of Operation Rescue [OR] (No. 01-1119)
OR Pet. App.	Appendix to OR's Petition for Certiorari (No. 01-1119)
OR Resp.	OR's Response in Support of Petition for Writ of Certiorari (No. 01-1118)
RA	Appendix to OR's Reply to Brief in Opposition (No. 01-1119)
Sch. Pet.	Petition for Writ of Certiorari of Joseph Scheidler, *et al.* (No. 01-1118)

STATEMENT IN REPLY

A core issue in this case is whether a nonviolent protest sit-in, conducted without any attempt to obtain property, qualifies as predicate extortion under the Hobbs Act.

The bulk of NOW's evidence addressed the pro-life sit-in movement of the late 1980's and early 1990's. While NOW refers to "121 predicate crimes," Opp. at 1, 6, apparently the jury found only 25 nonviolent sit-ins[1] and four unidentified acts or threats of violence to any person or property. OR Pet. at 2-3 & nn. 2-5; OR Pet. App. 311a-12a. NOW's inflated figure reflects quintuple counting. OR Pet. at 3 n.4.[2]

NOW impugns the defendants (petitioners) by citing evidence of unlawful acts and by quoting strong rhetoric from defendants. Several key points deserve emphasis.

First, NOW relies on contested *evidence*, *not findings*.[3] NOW's allegations of violence were vigorously disputed at trial, and the jury plainly disbelieved most (possibly all) of

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[1]NOW invokes Question 6 on the verdict form, OR Pet. App. 312a, as proving that none of the predicate sit-ins were peaceful or nonviolent. Opp. at 28 & n.31. NOW is mistaken. OR Pet. at 3 n.3.

NOW also asserts misleadingly that it never argued that a "peaceful" sit-in violated RICO, but fails to mention that, in NOW's view, *no* sit-in is peaceful unless the participants "part like the Red Sea" whenever anyone wishes to pass. RA 27-28 (closing argument).

[2]NOW mistakenly claims that petitioners do not challenge these jury findings. Opp. at 5 n.4. To the contrary, the legally flawed jury instructions require the overturning, at a minimum, of *all* of the jury findings of predicate acts and damages. OR Pet. at 19-30.

[3]NOW refers to what "the trial court found." Opp. at 1; *see also id.* at 6, 29, but liability was tried to the jury, not the trial court. That court reviewed the evidence in order to address certain post-trial motions, OR Pet. App. 235a-43a, but did not purport to make the findings supporting the jury verdict. Contrary to NOW's insinuation, Opp. at 7, this is not a case merely attacking the sufficiency of the evidence proffered to a properly instructed jury. Here, the jury was never properly instructed in the first place.

NOW's more inflammatory factual allegations, *see* OR Pet. at 4 n.5. More importantly, the jury, over defendants' objection, was not required to specify what unlawful acts it found. OR Pet. at 7 & n.12. There is thus no basis for crediting NOW's speculation as to the evidence underlying the verdict.

Second, the provability of these isolated (*see* OR Resp. at 4 n.3) alleged instances of misconduct are irrelevant to the purely legal questions presented in OR's petition. OR Pet. at 2-7.

Third, NOW's reliance, Opp. at 1, 3-4, upon "highly charged political rhetoric," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1992), as a basis for liability in treble damages and injunctive restraints, is flatly inconsistent with the right to free speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Claiborne*, 458 U.S. at 928.

Fourth, the evidentiary litany NOW provides actually highlights the essential need for precise jury findings and meaningful First Amendment limitations on liability in the context of extensive, overwhelmingly nonviolent protest activities. This is a case *par excellence* of an attempt to impose *liability* -- strict liability at that -- *for association*. *None* of the named defendants was alleged to have committed the scattered incidents of physical abuse NOW recites as "examples," Opp. at 2-3. Rather, the omnipresent "they"[4] did it. The First Amendment does not tolerate imposing damages and injunctions against activists in a social movement, even leaders, merely because of what someone else supposedly did,

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[4]In one paragraph, NOW uses "they" -- but no names-- sixteen times to refer to the alleged perpetrators. Opp. at 2-3. While NOW opens the paragraph with a sweeping reference to "Petitioners and fellow PLAN members," the listed incidents were overwhelmingly attributed by NOW's own witnesses to unidentified protesters, to named individuals who neither were defendants nor were identified as PLAN members, or to a former defendant (Monica Migliorino) whom the district court dismissed for lack of evidence linking her to PLAN, *see* OR Pet. App. 185a-91a, 206a, 231a.

especially when those misdeeds ran *contrary* to the leadership's directives. *Claiborne*, 458 U.S. at 925. *See* OR Pet. at 6 (defendants embraced nonviolence; OR required pledge of nonviolence from "rescue" participants). Indeed, the notion that protest leaders should be held liable for incidents such as one woman's grabbing one person around the neck at one location during a large-scale demonstration, RA 6-10, or one man elbowing a policeman during a sit-in, RA 11-17, is astonishing. NOW's reliance on such incidents, despite their manifest insufficiency -- and unconstitutionality -- as a basis for imposing associational liability, is quite telling.

ARGUMENT IN REPLY

I. No Private Injunctive Relief under RICO

A. Circuit Split. The decision of the Seventh Circuit below, that private parties can sue for injunctive relief under RICO, squarely conflicts with the Ninth Circuit's contrary holding, *see Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). *See* OR Pet. § I(A). The Seventh Circuit openly acknowledged and rejected the Ninth Circuit's holding, OR Pet. App. 7a-17a.

For the first time in this case, NOW tries to explain away this direct conflict. NOW's novel contention is that *Wollersheim* decided only the availability of *interim* injunctive relief, while the Seventh Circuit decided only the availability of *permanent* injunctive relief. Opp. at 7. This is flat wrong. The Seventh Circuit did not claim to distinguish *Wollersheim* on any such ground, and instead addressed the unqualified issue whether RICO "permit[s] private plaintiffs to seek injunctive relief." OR Pet. App. 7a. And in *Wollersheim*, the Ninth Circuit addressed the unqualified question "whether injunctive relief may be granted to a private plaintiff under civil RICO," 796 F.2d at 1082. The *Wollersheim* court's analysis in no way turned upon the incidental detail that the case was on appeal from a preliminary injunction. *Id.* at 1079-89. Moreover, the

Ninth Circuit reads *Wollersheim* as categorically rejecting private injunctive relief under RICO. *E.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999) (upholding judgment on pleadings: "Injunctive relief is not available to a private party in a civil RICO action") (citing *Wollersheim*), *cert. denied*, 528 U.S. 1075 (2000);[5] *Matek v. Murat*, 862 F.2d 720, 733 (9th Cir. 1988) ("the Ninth Circuit precludes an injunction in a private RICO action") (citing *Wollersheim*).[6]

B. Decision below improperly amends RICO to add private civil injunctive remedy. NOW argues that the Seventh Circuit was correct to read into RICO a private injunctive remedy. The decision below, however, conflicts with this Court's construction of indistinguishable remedial sections of federal antitrust law, OR Pet. at 12-13,[7] and disregards the text and history of RICO, *id.* at 13-19.

NOW concedes that § 1964(c), the private remedies provision of RICO, does not authorize injunctive relief. Opp. at 9 ("RICO's *only* source of permanent injunctions is § 1964(a)") (emphasis added). NOW therefore hangs its entire

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[5]*Oregon Laborers* squarely holds that no ultimate injunctive relief under RICO is available to private parties. NOW is therefore mistaken when it claims the Seventh Circuit is the "first circuit in RICO's 32-year history required to decide" the issue. Opp. at 9. Rather, the Seventh Circuit is the first circuit to reach a holding *contrary to the Ninth Circuit*.

NOW claims that in *Oregon Laborers* a lack of standing obviated the need to address whether RICO authorized private injunctive relief. Opp. at 8 n.8. In fact, the Ninth Circuit found no standing for *damages*, 185 F.3d at 966, but addressed injunctive relief as a separate issue, *id.* at 966-68.

[6]NOW dismisses the overwhelming consensus that no private injunctive relief is available under RICO, OR Pet. at 11-12 & nn. 17-18, as mere *dicta*. Opp. at 8. This is inaccurate. OR Pet. at 11 n.17 (listing cases).

[7]*Compare* RA 1 (text of Anti-Trust Act construed not to authorize private injunctive relief) *with* OR Pet. App. 308a (RICO § 1964). NOW badly misunderstands this argument. Opp. at 11. *See also* Sch. Pet. at 12 n.4.

case for injunctive relief on § 1964(a). This Court has already noted, however, that § 1964(a) is part of remedial provisions "limited to injunctive actions by the United States," *Sedima, S.P.R.L. v. Imrex*, 473 U.S. 479, 486-87 (1985). Despite *Sedima*, NOW argues that because § 1964(a) does not *expressly exclude* private parties, it must be read to *include* them. Opp. at 9-10.[8] This is illogical. Section 1964(a) does not, by its terms, authorize *any* party to bring a civil RICO action. The United States can sue for injunctive relief under RICO only because a separate subsection -- § 1964(b) -- gives the Attorney General authority to "institute proceedings under this section."[9] By contrast, the private treble-damages provision, § 1964(c) -- the only subsection to authorize private relief -- contains no blanket authorization for private parties to "institute proceedings." That subsection only entitles persons injured in their business or property to "sue therefor . . . and recover threefold the damages," § 1964(c). This subsection does not reference § 1964(a) or even "this section," but instead, as this Court has always understood, provides a distinct private damages remedy. OR Pet. at 13-15.

The history of RICO's adoption confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO. OR Pet. at 15-

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[8]This runs counter to the established rule that where a statute specifies certain remedies, other remedies should not be read into the statute. OR Pet. at 14-15 (citing cases). NOW dismisses these Supreme Court precedents as addressing "implied rights of action for parties without standing." Opp. at 11 (emphasis omitted). This is absurd. If the parties lacked *standing*, there would be no occasion for this Court to address *remedies*. (*California v. American Stores Co.*, 495 U.S. 271 (1990), is inapposite. The statute at issue there expressly authorized private injunctive relief, *id.* at 280 & n.6, unlike RICO's § 1964(c).)

[9]This straightforward reading of § 1964 obviously does not render § 1964(a) "a nullity," as NOW contends, Opp. at 10 n.14.

19.[10] This is not the mere plucking of "a few kernels from an ambiguous record," Opp. at 13, but rather the only fair conclusion that can be drawn from the record.

NOW disparages recourse to legislative history. Opp. at 12. But this Court has repeatedly invoked legislative history as a basis for limiting RICO. *E.g.*, *Holmes v. SIPC*, 503 U.S. 258, 267-68 (1992); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993). In fact, analysis of legislative history is characteristic of this Court's RICO jurisprudence. *See* OR Pet. at 15-19 (quoting repeatedly from this Court's treatment of RICO's legislative history).[11]

NOW argues that the question whether RICO authorizes private injunctive relief is academic. NOW invokes the "inherent powers" of courts as alternative authority for such relief, Opp. at 14, but the authorization of civil RICO remedies is not one of those "powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation marks and citations omitted). Likewise, the ability of courts to imply remedies in the *absence* of express Congressional direction is irrelevant here, where Congress has specified the remedies. OR Pet. at 14-15 (citing cases). *See also Pennsylvania Bureau of Correction v. United States*

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[10]OR does not rely "solely upon *Wollersheim*," Opp. at 12, in addressing the statutory history of RICO. Rather, OR relies upon the legislative record itself, and this Court's recounting thereof. OR Pet. at 15-19.

[11]NOW feebly attempts to mount a counterargument based on legislative history. Opp. at 13. NOW cites one law review article, drawing from it an equivocal floor comment by Rep. Steiger, and a senator's comments introducing the RICO bill, *see* 115 Cong. Rec. 9567 (1969), *before* the addition to RICO of the private cause of action at issue here, *see* OR Pet. at 16. NOW points out that the Senate (but not the House) voted -- after RICO's enactment -- to amend RICO by adding a private injunctive remedy, but this only highlights the fact that RICO, as enacted, contained no such remedy.

Marshal Serv., 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling").[12]

NOW speculates that the question of private injunctive relief under RICO is "unlikely to arise with future abortion protests" because FACE, 18 U.S.C. § 248, authorizes injunctive relief in that context. Opp. at 15. But civil RICO is already being invoked against *other* protesters with growing frequency, *see* OR Resp. at 7-8, and is widely used in other contexts.

II. Distortion of Hobbs Act Extortion

A. Proper vehicle. The only predicate crimes NOW urged for its RICO claim were species of "extortion" -- under the federal Hobbs Act, under state law, and under the Travel Act (RA 2-3).[13] OR Pet. at 4 n.6. OR challenges each of these. *Id.* at 19-26 & n.27. There are no unchallenged categories of predicates "sufficient to sustain liability," Opp. at 15. Furthermore, overturning *any* of the predicates requires overturning the judgment as a whole. OR Pet. at 5, 23.

B. Circuit split and merits. NOW concedes that "mere coercion" -- which is not a RICO predicate -- is insufficient to satisfy the elements of extortion. Opp. at 16. Yet NOW's definition of extortion -- applying "outside pressure" on "business decisions" by unlawful means, *id.* at 17, 19 -- is precisely "mere coercion." It is also a definition which sweeps

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[12]That RICO's remedies are in addition to remedies available under other sources of law, Opp. at 15, is irrelevant: here, the only remaining cause of action is civil RICO.

[13]The Travel Act incorporates extortion under the Hobbs Act and state law, *see* 18 U.S.C. § 1952(b)(i)(2); hence, that claim necessarily falls with the Hobbs Act and state law claims. The Hobbs Act "physical violence" crimes NOW refers to, Opp. at 5 & n.4, must be "in furtherance of a plan or purpose" to commit extortion (or robbery, which was not alleged here). § 1951(a), and thus likewise fall with the extortion claims. *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999).

in all unlawful protest against businesses. OR Pet. at 20. The Seventh Circuit's redefinition of extortion as any illegal "interference with rights," OR Pet. App. 36a, is even worse.

The issue is not whether *intangible* property qualifies as property under the Hobbs Act. *See* Brief for State of Alabama at 7-8. Rather, the problem is that OR and the other defendants did not *obtain* any property at all. OR Pet. at 19-23.[14]

The Ninth Circuit embraces a proper understanding of the "obtaining property" element of the Hobbs Act. OR Pet. at 22. NOW dismisses this case law as "gratuitous" and "sheer *dicta*," Opp. at 20, but this is not so. *See* OR Resp. at 7.

The Seventh Circuit's redefinition of Hobbs Act extortion is irreconcilable with *United States v. Enmons*, 410 U.S. 396 (1973). *See* OR Pet. at 21; Scheidler Pet. at 19-20; OR Resp. at 2-5. NOW badly jumbles defendants' arguments and instead responds to a straw man of its own making. Opp. at 21-22.

The Seventh Circuit has retroactively expanded Hobbs Act extortion to cover all unlawful social protest activities, in conflict with the rule of lenity, the rule of constitutional doubt, and the "clear statement" rule for federal intrusion into a traditional area of state concern. OR Pet. at 22-23. *See also Raygor v. Regents of Univ. of Minn.*, 70 U.S.L.W. 4159, 4162 (U.S. Feb. 27, 2002) (No. 00-1514) (and cases cited).

III. Improper Generic State Extortion Instructions

A. Proper vehicle. NOW proffered a jury instruction that replaced the elements of each state's extortion law with a watered-down, single generic substitute. Defendants objected,

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[14]When a competitor illegally forces a business to "give up" a share of the market, the offender thereby obtains (or attempts to obtain) that market share. *E.g., United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969). But when a social protest group pressures a business to close or change its practices, it does not "obtain" what was "surrendered." The same reasoning applies here. The pro-life defendants obviously had no desire to muscle their way into a share of the abortion industry.

RA 18-23, but the district court gave the instruction. *See* OR Pet. at 4-5. Defendants pursued the objection on appeal, OR Pet. App. 36a, but the Seventh Circuit declined to reverse, *id.* 36a-37a. The court below did not suggest that there was any waiver of this objection. The issue is properly preserved.[15]

B. Flawed generic instruction. NOW insists that the generic instruction, RA 25-26, incorporated "*all* the elements of each pertinent state's law," Opp. at 25 (emphasis in original), but this is patently wrong, OR Pet. at 25.

It is true that state law extortion must *at a minimum* satisfy the generic *federal* definition of extortion in order to qualify as a predicate for RICO either directly (18 U.S.C. § 1961(1)(A)), or through the Travel Act (*see* 18 U.S.C. § 1961(1)(B)). *See* OR Pet. at 23-24 (citing *United States v. Nardello*, 393 U.S. 286 (1969)[16]). The generic state instruction here does not even meet this minimum requirement. OR Pet. at 24. *In addition*, state law extortion must satisfy the distinct elements of *state* law. *Id.* at 23-24. The generic instruction here failed to incorporate those elements.

IV. Disregard of First Amendment.

The Seventh Circuit sustained a RICO judgment holding defendants vicariously liable for anything any participant in a pro-life demonstration ever did. OR Pet. § IV. This is unconstitutional "guilt for association," *Claiborne*, 458 U.S. at 925 (emphasis omitted). The jury instructions failed to

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[15]NOW makes the Catch-22 argument that the Hobbs Act issue cannot be reached because the state extortion verdicts suffice to uphold the judgment, Opp. at 15, and that the state extortion issue cannot be reached because the Hobbs Act verdicts suffice, Opp. at 23. NOW cannot have it both ways. Moreover, NOW's premises are faulty: the overturning of *any* of the predicates requires reversal. OR Pet. at 4 n.6, 5 & n.8, 23, 24, 26 n.27.

[16]NOW reads *Nardello* as obliterating the distinction between extortion and coercion. Opp. at 25. This reads *Nardello* exactly backwards. OR Pet. at 23-24 & n.24.

safeguard the First Amendment,[17] and the jury verdict confirms this. OR Pet. at 27-29. In addition, the refusal of the district court to require the jury to make findings as to who did what, OR Pet. at 7 & n.12, independently violated the First Amendment by precluding meaningful review, OR Pet. at 29-30.

NOW's suggestion that jury trials are exempt from First Amendment requirements, Opp. at 29-30, is meritless. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) ("the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge"). *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668, 688 (1989) (independent review of federal jury findings). Furthermore, concerns about deference to juries pose no bar whatsoever to reviewing the actions of *courts*, such as giving erroneous jury instructions, refusing to require the jury to specify what predicate acts the jury found to have been committed, and failing to grant defense motions for dismissal, summary judgment, remittitur, and so forth.

CONCLUSION

This Court should grant certiorari.

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[17]The Seventh Circuit found Instruction 30 to cure all of the First Amendment problems. OR Pet. App. 25a-26a. This conclusion was unwarranted. OR Pet. at 28-29.

NOW errs in its claims that defendants themselves drafted Instruction 30 (in fact, the district court proposed it, RA 23), that defendants failed to object to its final wording (in fact, defendants renewed their objection, RA 24-25), and that the Seventh Circuit held any objection waived (in fact, that court only said it was "inclined" to find a waiver for failure to renew the objection -- a mistaken premise, *see* RA 25 -- but nevertheless proceeded to the merits, OR Pet. App. 26a). Opp. at 27.

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March 18, 2002

APPENDICES

Anti-Trust Act [excerpts]

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined and otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

. . . .

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Quoted from *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 67-68 (1904).

Travel Act

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform --

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1952

[1474]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.	) No. 86 C 7888
Plaintiffs,	)
vs.	)
JOSEPH M. SCHEIDLER, et al.	) March 12, 1998) 1:30 p.m.) Chicago, Illinois
Defendants.	) Trial

VOLUME 6
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR,
and a jury

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1281 Woodridge Trails Drive
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MR. ROBERT HARLIB
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Chicago, Illinois 60602

* * *

[1533]

LYNNE RANDALL,
PLAINTIFFS' WITNESS, DULY SWORN
DIRECT EXAMINATION

BY MS. LAMBLE:

* * *

[1551]

Q. Did you have any personal contact with the blockaders?
A. Yes, I did.
Q. Would you tell us about that?
A. Well, * * * the crowd that was on the other side of the barricade that hadn't crawled underneath the barricade was getting louder and louder as the police were making arrests. Then suddenly this woman just reached over the barricade and

grabbed me around the neck and was trying to choke me, and I was extremely scared. You know, I just had been watching all of this going on, and here's somebody just grabbing me all of a sudden and trying to choke me.

Q. Did you suffer any injuries as a result of that?

[1552]

A. I had bruises on my neck. I ended up pressing assault charges against the person.

Q. What is this a photo of (indicating)?

A. This is a picture of somebody pointing out the bruise marks, one of the bruise marks on my neck.

Q. Any by the way, this is a part of Plaintiffs' Exhibit 1195. I misspoke earlier when I said 1196. Why did you have the photo taken?

A. Well, first I was just so shooken up by this happening, but I did want to press assault charges, and so this was something that we did to be able to show that I had been assaulted in case there was any conflict about it afterwards.

* * *

[1556]

CROSS-EXAMINATION

BY MR. CRAIN:

* * *

[1561]

Q. Okay. This incident, by the way, that involved this alleged assault that you pressed charges against someone, was that individual -- well, let me ask you this way. Was it Randall Terry or anyone that you identified as being a, quote, leader of Operation Rescue that did this?
A. The woman that assaulted me and that I pressed charges against was there as part of Operation Rescue and participating in the blockades with Operation Rescue.
Q. That's not my question, ma'am. Listen to my question. Was the individual Randall Terry or someone who you recognize as a leader of Operation Rescue?
A. I saw Randall Terry during the time, but that was not. The woman who assaulted me was not Randall Terry.
Q. Okay. I think that's fair enough for all of us to assume. Was it someone who you recognized as a leader in Operation Rescue?
A. No, it was not.
Q. Okay. You have no information, do you, ma'am, that anyone who on the part of Operation Rescue was conducting that demonstration instructed that individual, that lady, to assault you, do you?
A. Well, I certainly saw a lot of Operation Rescue individuals and their leaders having various conversations with people in the crowd. I don't know as to what they instructed people to do.

[1562]

Q. The answer to my question is that you don't have any personal knowledge, do you, of anyone who was a leader in

Operation Rescue instructing or directing that individual to attack you, isn't that true?

A. I don't have any direct knowledge.

* * *

[1563]

CROSS-EXAMINATION

BY MS. FISHER:

* * *

[1565]

Q. You spoke of an event where you were assaulted during a rescue, is that correct?

A. That's right.

Q. And you pressed charges against a woman who assaulted you, is that correct?

A. That's right.

Q. Do you recall that woman's name?

A. No, there were thousands of arrests, and I don't remember that individual person's name.

Q. Certainly thousands of them didn't attempt to choke you, is that correct?

A. That's right.

Q. Do you remember that one particular woman's name.

A. No, I don't. I don't remember.

Q. What happened with those charges?

A. Well, this is something that happened many years ago, as

you know, and we went to court. She was convicted.
Q. Convicted of?
A. Assault.
Q. Did you have to testify against her?
A. Yes.
Q. You don't recall --
A. Really, I tried to remember her name.
Q. -- her name.

THE COURT: Wait, wait. Only one person talk at a

[1566]

time.

MS. FISCHER: I'm sorry.

BY THE WITNESS:

A. I've tried to remember her name, but I think that because the event was very upsetting, I don't remember her. I don't remember her name, although I've been trying to remember her name for the trial.

BY MS. FISHER:

Q. Do you recall where that woman who assaulted you was from, where she was from?
A. I believe she was from Georgia.
Q. That's the state were all these rescues occurred, is that correct, that you spoke of today?
A. Yeah, we were talking about Atlanta.

* * *

[1573]

CARL S. PYRDUM, JR.,
PLAINTIFF'S WITNESS, DULY SWORN
DIRECT EXAMINATION

* * *

[1596]

BY MR. SACHNOFF:

Q. I think I asked you to turn your attention, sir, to August 15th, 1988. Can you tell us what happened that day?
A. Well, on that day, there was a protest at the Feminist Women's Center over on 14th Street, and a number of persons had appeared again from Operation Rescue and started blocking access to the property. I gave them formal official notice, which they refused to adhere to. Then as employees and patients were attempting to enter the property, myself and the other supervisor on the scene determined a point in their line that we were going to break, and we told both individuals at that time: Either unlock your arms or we're going to unlock them for you.

[1597]

Then we successfully unlocked their arms, and we created a space between myself and the other sergeant for

people to pass between. In the process of doing that, I had my back turned to a gentleman who was later identified to me as Mr. Metcalf, and Mr. Metcalf in a very forceful manner, after I had dislodged him and created this space, in a very forceful manner he struck me in the back of my rib cage with his elbow.

Q. And, sir, was that an intentional blow?

MR. CRAIN: Objection, Your Honor.

THE COURT: Sustained.

MR. SACHNOFF: Your Honor, this is a police officer.

THE COURT: He can describe what he saw.

BY MR. SACHNOFF:

Q. You indicated that Mr. Metcalf struck you?
A. Yes, sir.
Q. Where did he strike you, sir?
A. The back of my right rib cage.
Q. Was it a hard blow, sir?
A. Yes, sir, it was.
Q. What did you do after he struck you?
A. I immediately turned around and arrested Mr. Metcalf.
Q. What did you arrest him for?
A. Felony obstruction of a police officer.
Q. Was Mr. Terry present at the time that Mr. Metcalf struck

[1589]

you?

A. Yes, sir, he was.
Q. Did Mr. Terry say anything to you at the time Mr. Metcalf struck you?
A. After I was struck and I initiated the arrest on Mr. Metcalf, there was a large number of people from the media there that immediately came over because there was a flurry of activity around the arrest. Then Mr. Terry immediately approached and, upon my telling him what had happened, tried to justify or explain away in my mind --

MR. CRAIN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. SACHNOFF:

Q. Not in your mind, sir. What did he say?
A. He tried to tell me: Well, no, he didn't mean to hit you. Then I said: I think I know the difference between incidental contact and someone striking me. At that point in time, I informed Mr. Terry that if he or any of his personnel laid hands on my officers or myself in a violent manner such as just occurred, then they would be charged with felonies.

* * *

[1600]

CROSS-EXAMINATION

BY MR. CRAIN:

* * *

[1612]

Q. Lieutenant Pyrdum, the specific charges, there was introduction of certain exhibits during your testimony about warrants or arrests, information, affidavits, do you recall?
A. Yes, sir.
Q. Now, specifically the one that you testified to, I think it's 922, Plaintiffs' Exhibit, where you testified that individuals were arrested during activities at the SurgiCenter, I believe?
A. Yes, sir.
Q. And the actual charges, though, that were stated on this specific warrant, if you will look on the screen to your left again, would you just read what those charges were, please, sir?
A. "Criminal trespass, false name to police, felony obstruction of a police officer."
Q. This was Mr. Metcalf?
A. I can't see the suspect information. I'd have to assume that that's what you're showing me.
Q. I'm sorry. Let me lower it for you then, sir.
A. Yes, sir, that's Mr. Metcalf.
Q. All right. Is it your testimony that Mr. Terry after this

[1613]

occurred, that he approached you and attempted to explain that Mr. Metcalf was not intentionally or had no intention of what he was doing, that he attempted to tell you that it was not an intentional act?
A. Yes, sir.
Q. All right. You have no reason to believe, do you, Lieutenant Pyrdum, that Randall Terry coached him or

instructed him to do that, do you?
A. No, sir, I don't.

* * *

[1768-A]

VOLUME 7
TRANSCRIPT OF PROCEEDINGS
[March 16, 1998
2:30 p.m.]

* * *

[1774]

CARL S. PYRDUM, JR.
CROSS-EXAMINATION (Resumed.)

BY MR. CRAIN:

* * *

[1778]

Q. Let me return for a moment, sir, to this Metcalf incident. You testified, I believe, last week on direct that there was a gentleman by the name of Metcalf who was -- Robert Metcalf,

[1779]

who was placed under arrest at an incident that occurred one morning there at one of the clinics. Do you recall that?
A. Do I recall that?

Q. Do you recall it?
A. Yes, sir, I do.
Q. Do you recall that this specific individual, Robert Metcalf, was from Anchorage, Alaska?
A. I don't recall that specifically, but that's what his arrest information indicates, yes, sir.
Q. And would it not also be true that Mr. Metcalf's offense was resolved by him paying a $200 fine and returning to the state of Alaska?
A. It's my understanding that it was pled down to a lesser offense. Whether it was called to trial, I don't know, sir.
Q. Okay. Now, out of all the 1200 arrests that you either observed or participated in directly during the time from July to October, this is the one that you brought to court to show us as far as representative of the arrests that you did?
A. I didn't bring that, sir.

MR. SACHNOFF: Objection, Your Honor.

THE COURT: Overruled.

BY MR. CRAIN:

Q. Now, in this specific exhibit -- and I'll refer to Exhibit 922 -- do you have a copy of that in front of you there? I'm sorry. You've got it in front of you now?

[1780]

A. Yes.
Q. On Page 2 of the report where it has "2 of 2" on the top right -- left corner, would it not be true --

A. I don't have "2 of 2," sir. I have "1 of 2."

MR. CRAIN: All right. Does counsel have it?

MR. SACHNOFF: Yes. May I hand this to the witness, Your Honor?

THE COURT: Yes, sir.

MR. SACHNOFF: I think that's what he's referring to.

THE WITNESS: Thank you.

BY MR. CRAIN:

Q. Would it be true, lieutenant, as far as Mr. Metcalf's actions were concerned that day, he was acting individually at the time he committed the offense he was charged with?
A. I think the act he committed was as an individual, yes, sir.
Q. In fact, you specifically referenced that in the sentence beginning, and I quote: "Once the employees and patients had entered the property, I recrossed the picket line without incident, and upon commencement of the arrest Mr. Metcalf was charged according to his individualistic use of force."

Do you see that?
A. Yes, sir.

* * *

[4281]

VOLUME 22
TRANSCRIPT OF PROCEEDINGS
[April 8, 1998
2:50 p.m.]

* * *

[4283]

Jury Instruction Conference

AFTERNOON SESSION

(Whereupon, the following proceedings were had in open court, outside the presence and hearing of the jury:)

THE COURT: Let's start with the plaintiffs' proposed jury instructions. * * *

* * *

[4355]

THE COURT: All right. Now, 29, unlawful acts under RICO, state law extortion.

MR. CRAIN: Your Honor, I guess the obvious objection here is how can one have a generic extortion charge. I mean, if there were predicate acts of extortion committed in a state, again the elements of that extortion law must be applied or else

the jury's going to be left to surmising or guessing or assuming how one could be found liable of extortion in a state which might make extortion an entirely different kind of animal from what the Hobbs Act extortion says it is.

I don't know how we could give -- it would be like a generic murder instruction. You know, if the plaintiffs contend that predicate acts of extortion were committed in Kansas during the Wichita event, then the Kansas statute for

[4356]

extortion must be given. The only other alternative is to take out the state instructions altogether and leave this under the Hobbs Act instruction. Otherwise as to each state where they contend predicate acts of extortion occurred the jury's got to be given what the law is, otherwise how can the defendants be found liable for committing some generic extortion.

MS. CLAYTON: You know, in our first draft of the jury instructions back in I think it was December -- or actually it was a year ago, but we redid them in December, we had the 50 states or something real close to it. It became very clear that for anyone to read those to the jury and for the jury to read them would be such a burden. What we did was we looked at all of them, took the most strenuous version of them.

So, for example, I'm just making up the states here, but let's suppose in Indiana it's easy to violate the extortion and it's hard in Kansas. We went with the definition of Kansas. So maybe we could have had an easier violation in Indiana, but we didn't want the jury to have to sort out 50 states. And as I

mentioned the other day, Your Honor, the only exception to that is that in a few states there is a dollar limit, a dollar minimum for the value of the right that's being taken here.

And what we have done is added that at the end as an

[4357]

additional requirement with regard to those particular states. I think the backup for all of these is in that prior set of jury instructions if anybody needed to look at it, but we've certainly tried to pick a -- I don't want to call it a plain vanilla because it's really the strictest definition of state law extortion we could come up with.

MR. CRAIN: Your Honor, if the plaintiff -- this case is complex because of the number of predicate acts. If the plaintiffs are suffering from their own device, it's not our fault really. I mean, not that it's anyone's fault necessarily. But just the mere fact that their case is complex doesn't obviate the need to give the law as to what the case law is to be applied. And if they want to allege, and they are certainly at liberty to do so, as a predicate act that extortion occurred in a number of states, that's certainly their liberty to do it.

But they're going to have to give the law as to what is to be applied to those facts in those states, otherwise the jury's left with applying some vanilla version or generic version of the extortion statute that may be different from state to state to state.

MS. CLAYTON: I would just suggest that if -- Mr. Crain's

had our instructions for many months. And if he thinks there's anything wrong with any one of them, that we somehow understate the requirement, I'd be happy to hear

[4358]

about it. I think we've done a very careful job. But if there's anything he thinks we missed, we'd be happy to look at it.

MR. CRAIN: We did file written objections to your state instructions, and we filed those with the Court and served them on you back in I think January. So those are of record.

THE COURT: I'll take this one under advisement. I'll take a look at the state statutes, and if there are states that include anything beyond what's stated here, then we'll take that up. I'll take this one under advisement.

Miss Clayton, if you can give us a copy of your original submission with the state -- it's in the court file somewhere, but I don't know where they are.

MS. CLAYTON: Sure. I could probably just give you my copy right here.

* * *

[4543]

VOLUME 24
TRANSCRIPT OF PROCEEDINGS
[April 13, 1998
8:15 a.m.]

* * *

[4545]

Jury Instruction Conference

(Whereupon, the following proceedings were had in open court, outside the presence and hearing of the jury:)

THE COURT: All right. Let's resume our discussion of jury instructions. * * *

* * *

[4576]

MR. CRAIN: Your Honor, they're both inchoate crimes. You can't have an attempt to attempt or an attempt

[4577]

to threaten. But more importantly, also the state law instructions -- there are no state law instructions. A jury would necessarily have to guess as to what was extortion under state law. That's why B is in Your Honor's list a problem, where it says in violation of the law of any state. There is no state

instruction.

THE COURT: Well, we've talked about that. There is a generic state instruction.

* * *

[4579]

THE COURT: I'll tell you what, why don't you -- we'll come back to that in about 20 minutes. Let me propose some language for you to think about, and then we'll come back after I do motions.

I would propose in lieu of the agency instruction an instruction that would be captioned Defendants Liability for the Acts of Others, and it would read as follows:

"In order to impose liability on the defendants for the illegal acts of others, the plaintiffs must show that the enterprise or those acting on behalf of the enterprise authorized or ratified the illegal conduct.["] We'll come back in about 20 minutes and talk about that and the rest of the instructions.

* * *

[4919]

VOLUME 26
TRANSCRIPT OF PROCEEDINGS
[April 15, 1998
9:45 a.m.]

* * *

[4922]

(Whereupon, the following proceedings were had in open court, outside the presence and hearing of the jury:)

THE COURT: Let's take up the jury instructions.* * *

* * *

THE COURT: * * *All right. The third instruction is No. 30, which is the defendants' liability for the acts of others. Now, that has been reworked

[4923]

from the original version. Miss Clayton.

MS. CLAYTON: Your Honor, my understanding from Your Honor's -- our colloquy the other day was that the phrase directly or indirectly would be inserted, and I believe it's even on the verdict form.

THE COURT: You are correct. You are correct.

MS. CLAYTON: I think that should come before the phrase "authorized or ratified".

THE COURT: Any other comments or objections?

MS. CLAYTON: Just the same we had the other -- oh, you

know, actually another -- I didn't recall that the phrase specific intention was in before. And if I didn't object before, I would object to that here.

THE COURT: All right. It's overruled.

MR. CRAIN: And we would simply raise the same objections as we noted before about the association of [sic: associational] rights.

THE COURT: All right. The objections having been noted, we'll make these changes in the instructions.* * *

* * *

[4919]

VOLUME 26
TRANSCRIPT OF PROCEEDINGS
[April 15, 1998
1:05 p.m.]

* * *

[4946]

[JURY CHARGE]

[THE COURT:]

State law extortion. Plaintiffs have alleged that the defendants and others associated with PLAN committed acts

that violate various states' laws against extortion. In

[4947]

order to show that state law extortion has been committed, the plaintiffs must show that the defendant or someone else associated with PLAN intentionally caused women, clinic doctors, nurses, or other staff or the clinics to give up a property right.

The term property right means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear.

Plaintiffs must also show that the defendant or other persons associated with PLAN did this through the use of violence or fear including threats of personal injury, damage to property, or economic interests, or threats to commit other crimes. The threat need not have been actually carried out and the defendant need not have even actually intended to carry out the threat.

If you find that the defendant or another person associated with PlAN committed, attempted, or conspired to commit extortion in certain states, you must also find that the value of the rights involved is as follows:

In Missouri more than $150, in Kansas more than $500, and in Texas more than $1500.

* * *

[4996]

VOLUME 26
TRANSCRIPT OF PROCEEDINGS
[April 15, 1998
1:05 p.m.]

* * *

[5000]

CLOSING ARGUMENT ON BEHALF OF THE CLINIC PLAINTIFFS

* * *

[5008]

Christie Ann Dickson, another defense witness, she conceded that even what she called peaceful blockades, blockades that closed clinics for hours until the police could clear the blockaders out, she still claimed that they were peaceful. But to the women who couldn't get into that clinic, what could be more forceful during a time the clinics were closed by those forceful blockades. In every instance we've shown you, the property rights of the clinics and the women were extorted under RICO. Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion.

There is one way, I guess, in which you don't have the

element of force in a blockade, and that would be if the blockaders did something that they were specifically instructed that they should never do, that is, politely move aside, part like the Red Sea and let a woman through. But you know that never happened. No witness ever testified to that. No witness, not defense, not plaintiff, ever said that any of the blockaders were instructed to let women through.

Calling the Randy Terry style of blockades peaceful is just more of the strange language that the defendants use.* * *